Counsel indicated to the district court that Mr. Gotcher's sentencing testimony regarding the negotiations and the cooperation understanding was necessary and that the district court should consider defense counsel's argument that the Government had breached its part of the agreement in the case, and that the Government's refusal to file a 5K1.1 constituted an act of bad faith. The district court did not agree. It was argued the district court should consider the information regarding cooperation for a downward departure from the guidelines pursuant to U.S.S.G. 5K2.0. This too was rejected.

During plea negotiations, AUSA Gallant indicated that the Government was interested in a civil suit in New York involving a company that Mr. Alford had obtained the pills from. AUSA Gallant said the Government would be interested in a potential 5K1.1 if Alford testified truthfully in New York either by deposition or in person. Alford's plea rested in part on the representation that he would receive a 5K1.1 from the Government if he, in fact, went to New York and testified. Gotcher looked at his notes and remembered that he had gone over the agreement with Alford and indicated if he cooperated in New York by either testifying or giving a deposition and provided information on other illicit activities that the Government would move for a 5K1.1 if they felt there was substantial assistance.

Gotcher talked to AUSA Schachner after Alford testified. He was satisfied through conversations with Schachner that Alford provided the information against the company by deposition. He told him that as far as his testimony regarding the company he thought Alford did "fine".

Again it was Gotcher's belief that based on his negotiations with AUSA Gallant that if Alford went to New York and gave testimony he would receive a 5K1.1 in

addition to providing other information and that the other information did not have to be critical. Cooperation in New York was the main thrust.

The plea agreement was executed on November 24, 2003 and when it was executed the United States Supreme Court had not released its decision in *Blakely v. Washington*, 542 U.S. __, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004).

Defense Counsel argued to the district court that although the United States Government had the sole discretion to recommend or not recommend a 5K1.1 or later a Rule 35, in this case it was uncontroverted that Alford went to New York, provided truthful testimony, was helpful, and the Government did nothing to contradict. The cooperation met the requirements set forth in the plea agreement and there was no way for the Government to get around this.

AUSA Hess simply referred the court back to the cooperation agreement and the Government's unilateral determination to recommend a departure. Hess stated **"there is no question that Mr. Alford cooperated fully."** He obtained his third point reduction because of that full and complete cooperation, but there is, I believe, under a 5K1.1 departure, certain necessary requirements are at least certain factors that come into consideration from a prosecutors standpoint and that is first and foremost that there is a **prosecution such as a criminal case**. I believe Mr. Cook summed it up that some of the people he talked about, and the information that he gave, people had already been prosecuted or the information was too stale to proceed." (emphasis added) AUSA Hess went further to state "so from that standpoint, it is the Government's position that while Mr. Alford cooperated fully and completely to our knowledge, without making any

determination whether his cooperation was 100% truthful or not, as alluded as a possibility in the email from Elliot Schachner; that just complying with the terms of cooperation under the plea agreement does not necessarily amount to substantial assistance in the prosecution of a criminal case."

The district court sought a standard of review with regard to substantial assistance and the Government gave the definition that it is **substantial assistance in the investigation and prosecution of another person who has committed an offense** and if substantial may justify a sentence below a statutorily required minimum mandatory.

With regard to the Government's statement that for his cooperation he received a one level additional 3E1.1 downward departure for acceptance of responsibility, counsel for Alford directed the court's attention to the Sentencing Guideline Manual 5K1.1 in the application notes, note 2, where it states the sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. It was argued that the Government is using that as a basis to avoid a 5K1.1 was inappropriate. Alford through counsel argued that the Government acted in bad faith. Alford had been truthful and forthright in New York and Oklahoma in his cooperation. 5K1.1 looks at five separate factors including the usefulness of the defendant's assistance. The Government did not advance any valid reasons for its failure to go forward on the motion. Alford's trip to New York was because the United States Attorneys Office in New York wanted him to come there to help them go against the company either criminally or civilly or possibly both. Alford was transported to New York with the belief that if he testified in New York he would receive some credit. There was nothing to suggest that he should not receive credit. Alford gave everything he had and for the Government to

push its unilateral discretion to this level was bad faith.

After a brief recess the district court made a determination that the Government *had the sole discretion* to decide to move for departure. The district court noted, an unpublished Tenth Circuit Opinion, *United States v. Kovac*, a 2001 case. The court went further to state that if it found it could review for bad faith on the part of the Government it would find insufficient evidence of bad faith existed. The district court acknowledged that everyone was at a disadvantage because of the absence of AUSA Gallant, who was serving in the Middle East in the Armed Forces. The district court found insufficient evidence of substantial assistance. The district court stated that "Alford did help New York" but there is no evidence as to the sufficiency or the level of help that was given.[1] The district court overruled the motion.

Defense counsel even requested an adjournment to gain the presence of Mr. Schachner and the court indicated that it was not inclined to delay sentencing to bring AUSA Schachner. Counsel indicated that the district court advised that he had a right to appeal and the plea agreement which was executed in November 2003 contained a waiver of right to appeal and a 2255. However, it was the position of the defendant at sentencing based on *Blakely v. Washington* (released on June 24, 2004 and not contemplated by Attorney Gotcher and Alford), that he should be able to

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[1] This is not surprising given the fact that Elliot Schachner would not discuss with Mr. Gotcher the level of assistance of Mr. Alford deferring to his colleague in Oklahoma., Hess. The undersigned would advise that post sentencing her attempts to confirm this information has met with the exact same response from Mr. Schachner. In other words Alford and his attorneys have been unable to independently verify and confirm this information that was provided through the AUSA Schachner in New York to AUSA Hess in Oklahoma.

appeal and that he did, in fact, plan to take an appeal. The Government did not voice any objection.

REASON TO GRANT WRIT

The Tenth Circuit Court of Appeals affirmed Alford's sentence because in a pre-Blakely plea agreement he waived his right to appeal and collateral review. He was sentenced after the release of *Blakely*, filed *Blakely* sentencing objections, and raised a Blakely objection at sentencing, and advised that he would appeal. The Tenth Circuit held that the waiver was valid. In addition to being inherently unfair this decision denies Alford and others equal protection of the law. Criminal defendants without appeal waivers and those entering pleas post Blakely are afforded the opportunity to raise proper Blakely (Booker) objections and appeal. The timing in this case does not justify this unequal treatment and disparity.

Stutson v. United States, 516 U.S. 163, 116 S.Ct. 600, 133 L.Ed 2571 (1996). "Finally, it is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights to which the important public interests in judicial economy and finality must occasionally be accommodated. We have previously refused to allow technicalities that caused no prejudice to the prosecution to preclude a remand under 28 U.S.C. §2106 in the interests of justice." This court should intervene exercising its supervisory powers to restore equity in the sentencing of criminal defendants in federal courts.

The district court in denying Alford's bad faith argument against the Government for failure to file a U.S.S.G. §5K1.1 downward departure for substantial

assistance agreed with the Government's argument. The Government argument rested in large part on the premise that U.S.S.G. 5K1.1 was not available to Alford because his complete cooperation with the Government had been in a civil rather than a criminal case.

This Court should define the law as relates to the availability of U.S.S.G. §5K1.1 cooperation credit to criminal defendants who assist the Government in a civil rather than criminal prosecution. The district courts decision, ratified by the Tenth Circuit, denies equal protection of the law to Alford and others similarly situated. 18 U.S.S.G. §5K1.1 states in pertinent part: Substantial Assistance to Authorities - Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons substantial may include, but are not limited to, consideration of the following: (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and (5) the timeliness of the defendant's assistance.

18 U.S.C. §3553(e), which authorizes U.S.S.G. downward departures states in pertinent part: (e) Limited authority to impose a sentence below a statutory minimum. – Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by

statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

There is nothing in the language of U.S.S.G. §5K1.1 that precludes application to a criminal defendant whose assistance to the Government was in a civil rather than criminal matter. This court should intervene exercising its supervisory powers to eliminate this unequal application of the law and disparity among similarly situated federal offenders. Additionally, this Court should address the validity of unilateral plea agreements calling for the waiver of a defendant's right to appeal or collaterally attack his conviction or sentence when post plea the law changed rendering the United States Sentencing Guidelines advisory rather than mandatory.

ARGUMENT

WHETHER U.S.S.G. §5K1.1 IS AVAILABLE TO A DEFENDANT WHO COOPERATES WITH THE GOVERNMENT IN A CIVIL PROCEEDING.

Alford entered into a plea agreement requiring cooperation. The agreement was entered into between Alford's lawyer, former attorney Warren Gotcher and AUSA Jeff Gallant. It was clear from the terms of the plea agreement that if Alford assisted the Government, the Government would file a motion for downward departure. Specifically, the plea agreement as articulated at the change of plea by AUSA Jeff Gallant indicated that Alford would plead guilty to Count 1 of the indictment with the Government's agreement to dismiss Count 2, that the defendant would agree to cooperate with the Government,

and the Government would file a motion for downward departure as outlined in the plea agreement.

Based on all indications, including but not limited to, representations made at sentencing by Warren Gotcher and the literal terms of the plea agreement, Alford was expected to assist the United States Government in New York in either a civil or criminal matter by providing testimony before a grand jury and/or a deposition against the pill manufacturer who sold him the over the counter-pseudoephedrine in large bulk quantities by mail order.

There was never an understanding between former AUSA Gallant, former defense counsel Gotcher, or the Defendant in this case that he would only be credited if his assistance involved the criminal prosecution of an individual.

At the time of his sentencing AUSA Paul Hess, in articulating to the district court reasons for not moving for a downward departure, simply referred the court back to the cooperation agreement where the Government had a unilateral ability to determine and recommend a departure. The Government conceded at sentencing that there was no question Mr. Alford **cooperated fully**. However, the Government explained this level of cooperation as justifying only an additional third point for acceptance of responsibility pursuant to 3E1.1. There is nothing, however, that limits a cooperation downward departure based on an award of the extra 3E1.1level. In fact the extra level for the 3E1.1 downward departure has nothing to do with cooperation. Further, there is nothing barring 5K1.1 credit for cooperation with the Government in a civil case.

The government went further to state that it was the Government's position that while Alford cooperated fully

and completely that did not necessarily amount to substantial assistance in the prosecution of "a criminal case." The Government elected not to file a 5K1.1 motion for downward departure after Alford gave it total cooperation and substantial assistance. The Court erred when it determined that it could not depart from the guidelines under 5K2.0 without a government motion.

The government made it clear that it would use the cooperation and assistance Alford gave them to pursue any and every criminal, civil, and administrative proceeding available to it. It was not Alford's fault that a criminal prosecution did not result (at least it remains an unknown result at the time of this writing). His substantial assistance and cooperation was noted by the government and could have been considered by the court as requested at sentencing under 5K2.0.

It is clear that a 5K2.0 departure is allowed ...[2] If the special factor is an encouraged factor, the court is authorized to depart if the applicable guideline does not already take it into account... It recognizes substantial assistance in civil matters. Case law in the Second, Sixth and Ninth Circuits and in the Eastern District of New York allow for 5K2.0 departures without a government motion in cases where information is shared by the defendant with the authorities, which leads for example to the exposure of security breaches or reveals the modus operandi of an illegal operation, that can frustrate measures by the authorities to prevent crime. There is no good reason, and the guidelines suggests none, to condition the exercise of judicial discretion on a government motion.

These courts have recognized this distinction and have observed that when the defendant's cooperation does not involve investigation or prosecution of another, the governments power to limit the court's exercise of

discretion to depart downward under 5K1.1 does not apply. See *United States v. Kahn*, 920 F.2d (2nd Cir. 1990); *United States v. Truman*, 304 F.3d 586 (6th Cir. 2002); *United States v. Sanchez*, 927 F.2d 1092 (9th Cir. 1991); *United States v. Stoffburg*, 782 F.Supp. 17 (E.D.N.Y. 1992).

Alford contends that the district court was not bound by 5K1.1 and could determine if a 5K2.0 departure was appropriate.

WHETHER A PRE-BLAKELY WAIVER OF RIGHT TO APPEAL IS INVALIDATED BY A PRESERVED BLAKEY OBJECTION AT SENTENCING.

Alford was sentenced on August 6, 2004. At that point counsel had the benefit of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), and *Blakely v. Washington*, 542 U.S. __, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004). It was obvious that the *Blakely* Court had determined that it was inappropriate for a defendant's sentence to be enhanced absent a jury finding beyond a reasonable doubt or admission of the defendant as to the sentencing enhancements prior to and at Alford's sentencing he objected to the firearm enhancement as he had not assumed responsibility for a firearm at the change of plea and generally that *Blakely* rendered the guidelines unconstitutional. This was noted by the sentencing judge in his statements that although other courts had determined the guidelines unconstitutional, he simply was not willing to take that leap given the fact that there was other Supreme Court precedent consistent with the Fifth Circuit's decision in *Pinero* that limited his ability to determine the same.

At sentencing, Alford specifically opted out of his previous waiver of his right to appeal based on the unforeseen decision in Blakely. The district court

acknowledged that he had a right to appeal and the Government did not object.

Based on the holding in *Booker v. United States*, decided January 12, 2005, this case as others on direct appeal are to receive the benefit of the *Booker* decision. Specifically the United States Supreme Court in *Booker* held that its "remedial interpretation of the Sentencing Act "must be applied" to all cases and direct review". It is axiomatic that in this particular case, given the proper and preserved objections that Alford made at the sentencing, that this defendant should be re-sentenced. Pursuant to 18 U.S.C. §3553, there are numerous mitigating factors that should be considered in the overall re-sentencing of this defendant that were unavailable for the court to consider before. These include but are not limited to: his motivation not to manufacture methamphetamine but simply to sell pills at a profit to those who did; his age, his poor health, and his outstanding citizenship prior to the instant offense are all factors that the court could consider and should consider at a re-sentencing.

Alford's case was on direct appeal at the time of the release of *Booker v. United States*, 543 U.S. _, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005). Subsequently the Tenth Circuit released *United States v. Allen*, 134 Fed. Appx. 261, (10th Cir. 2005).

In *Allen*, as here, the defendant challenged his appeal waiver. His contention was that he made a timely *Blakely* objection which adequately preserved his *Booker* argument. As such, and because *Booker* applies retroactively to cases on direct review, he has not waived his right to appeal.

This Court in *Booker* specifically followed its earlier holding in *Griffith v. Kentucky*, 479 U. S. 314 L.Ed. 2d

649, 107 S. Ct. 708 (1987) where it held it "must apply" its holding "to all cases on direct review". *Booker*, 125 S.Ct. at 769. (Citing *Griffith* for the proposition that "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal,...not yet final" when the rule is announced) (emphasis supplied); see *Griffith*, 479 U.S. at 323 ("We fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final.") The Tenth Circuit therefore concluded that Mr. Allen may challenge his sentence under *Booker*. Mr. Alford maintains the same argument and should be entitled to challenge his sentence.

Mr. Allen's, as well as Mr. Alford's, timely *Blakely* objection adequately preserved his *Booker* argument. See, e.g., *United States v. Pineda-Rodriguez*, 133 Fed. Appx. 455, 2005 U.S. App. LEXIS 7943, No. 04-4145, 2005 WL 1030453 at * 1 n.4 (10th Cir. May 4, 2005).

CONCLUSION

For the reasons set forth above, Petitioner prays that this Court grant the petition and review the judgment.

Respectfully submitted,

Susan G. James, Esq.
Counsel of Record for Arnold Joe Alford

FILED
United States court of Appeals
Tenth Circuit
August 24, 2005
PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, vs. ARNOLD JOE ALFORD, Defendant - Appellant.	No. 04-7082 (D.C. No. 03-CR-93-W) (E.D. Okla.)

ORDER AND JUDGMENT*

Before **KELLY**, **O'BRIEN**, and **TYMKOVICH**, Circuit Judges.**

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

**After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1(G). The cause is therefore ordered submitted without oral argument.

Defendant-Appellant Arnold Joe Alford seeks to appeal his sentence for possession of pseudoephedrine, a listed chemical, knowing that it would be used to unlawfully manufacture methamphetamine. 21 U.S.C. § 841(c)(2). He was sentenced at the bottom of the applicable guideline range of 210 months and two years supervised release. On appeal, Mr. Alford contends that (1) the government should have been compelled to file a U.S.S.G. § 5K1.1 motion for departure based upon his substantial assistance, and (2) he should be resentenced based upon United States v. Booker, 125 S. Ct. 738 (2005), having objected to a two-level firearms enhancement under U.S.S.G. § 2D1.11(b)(1).

The government addresses the first issue on the merits, but argues the second is precluded by a waiver of appellate rights in Mr. Alford's plea agreement. Our jurisdiction arises under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We affirm the district court regarding the § 5K1.1 motion because the government does not argue this claim is barred by the waiver. See United States v. Clark, __ F.3d __, 2005 WL 1799806, at *2 n.1 (10th Cir. July 29, 2005) (declining to address waiver issue where government did not raise the issue). We enforce the plea agreement and dismiss the appeal insofar as the Booker issue because Mr. Alford waived his right to appeal his sentence by knowingly and voluntarily entering into the plea agreement.

Background

The parties are familiar with the facts in this case, and

we need only repeat those pertinent to our discussion here. On November 24, 2003, Mr. Alford entered into a plea agreement with the government. The agreement detailed the maximum penalty for his offense and noted that the district court was not bound by the agreement or any recommendations by the parties. Aplt. App. 19. Mr. Alford agreed to cooperate with the government but the agreement specified that a "motion for departure shall not be made, under any circumstances, unless defendant's cooperation is deemed 'substantial' by the United States Attorney." Id. at 17. Further, assuming the government made such a motion, the final decision regarding whether a sentence reduction was warranted rested with the district court. Id. at 19. In addition, the agreement contained the following waiver of appellate rights:

> Both plaintiff and defendant specifically reserve the right to appeal any actual departure from the Presentence Report sentencing range found applicable by the Court after ruling on objections, if any, by plaintiff and defendant to such sentencing range.
>
> Defendant expressly waives the right to appeal defendant's sentence on any ground, except to challenge an upward departure from the applicable guideline range as determined by the Court. Defendant specifically waives any appeal rights conferred by Title 18, United States Code, Section 3742, any post-conviction proceedings, and any habeas corpus proceedings. Defendant is aware that Title 18, United States Code, Section 3742 affords defendant the right to appeal the sentence imposed. Defendant is also aware that the sentence herein has not yet been determined by the Court. Defendant is aware that any estimate of the probable sentencing range that defendant may receive from his attorney, plaintiff, the probation office, or any agents of such

> parties, is not a promise, and is not binding on plaintiff, the probation office, or the Court. Realizing the uncertainty in estimating what sentence defendant will ultimately receive, defendant knowingly waives the right to appeal the sentence (except as to an upward departure) and agrees not to contest such sentence in any post-conviction proceeding, including but not limited to writs of habeas corpus or coram nobis concerning any and all motions, defenses, probable cause determinations, and objections which defendant has asserted or could assert to this prosecution and to the court's entry of judgment against defendant and imposition of sentence, in exchange for concessions made by the United States in this agreement and the execution of the agreement itself.

Id. at 19, 22-23. Subsequent to the plea agreement, Mr. Alford changed counsel. The district court entered judgment in the case on August 12, 2004. Mr. Alford timely appealed the next day.

Discussion

A. Waiver of the Right to Appeal the Booker Issue.

We first address the issue of whether Mr. Alford's appeal waiver is enforceable. Because the government only argues waiver in relation to Mr. Alford's Booker argument, we will so limit our analysis and address the § 5K1.1 departure separately. We have both "statutory and constitutional subject matter jurisdiction over appeals when a criminal defendant has waived his appellate rights in an enforceable plea agreement." United States v. Hahn, 359 F.3d 1315, 1324 (10th Cir. 2004) (en banc). In determining whether a waiver is enforceable, we consider: "(1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and

voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice." Id. at 1325.

Mr. Alford's Booker argument falls within the scope of his appellate waiver. We strictly construe appellate waivers reading any ambiguities therein in favor of the defendant. Id. Broadly worded waivers can encompass Booker arguments. United States v. Clayton, __ F.3d __, 2005 WL 1799819, at *1 (10th Cir. Aug. 1, 2005); United States v. Green, 405 F.3d 1180, 1189 (10th Cir. 2005) (citation omitted).

In Mr. Alford's plea agreement, he "expressly waive[d] the right to appeal [his] sentence on any ground, except to challenge an upward departure from the applicable guideline range as determined by the Court." Aplt. App. at 22 (emphasis added). Mr. Alford's arguments that his sentence is in violation of Booker, based on the district court's mandatory application of the guidelines and the enhancement for possession of a firearm under U.S.S.G. § 2D1.11(b)(1), do not relate to an "upward departure." His first argument challenges the general application of the Guidelines, and as in Green, he specifically acknowledged in the plea agreement that the then-mandatory sentencing guidelines applied to his case. See Aplt. App. at 16 ("The defendant . . . understand[s] that the United States Sentencing Commission Guidelines which took effect on November 1, 1987, will apply to the offense to which [he] . . . plead[ed] guilty . . . ."). Thus, any argument to the contrary falls within his wavier of appellate rights. See Green, 405 F.3d at 1189 (holding that by agreeing the court was "'required to consider the applicable sentencing guidelines'" the defendant accepted the "mandatory Guidelines regime that existed before Booker" and therefore his Booker arguments fell within his broad appellate rights waiver).

Further, sentencing "enhancements" and sentencing "departures" are not synonymous such that Mr. Alford's waiver exception for upward departures imposed by the court would also except a sentencing enhancement under U.S.S.G. § 2D1.11(b)(1). Compare United States v. Hannah, 268 F.3d 937, 940-41 (10th Cir. 2001) (departures from the guidelines are discretionary with sentencing court and as such are reviewed for abuse of discretion), with United States v. Cardena-Garcia, 362 F.3d 663, 665 (10th Cir. 2004) (sentencing enhancements involve application of guidelines and are reviewed de novo). As such, this argument also falls within the scope of his appeal waiver.

We also find that Mr. Alford knowingly and voluntarily waived his appeal rights. In addressing this question, we consider whether the plea agreement recites that the defendant knowingly and voluntarily entered into the agreement, and we also consider whether there was a proper Federal Rule of Criminal Procedure 11 colloquy between the court and the defendant when the plea was taken. Green, 405 F.3d at 1190 (citing Hahn, 359 F.3d at 1325). Here, Mr. Alford signed and dated the plea agreement, expressly acknowledging that he had read and reviewed the agreement with his attorney and that he "fully under[stood] it and . . . voluntarily agree[d] to it without reservation." Aplt. App. at 25. Likewise, during the plea colloquy, the court reiterated the rights Mr. Alford was relinquishing, including his right to appeal, and Mr. Alford indicated he was doing so "voluntarily and completely of [his] own free choice." Aplt. App. 59. Thus, Mr. Alford's plea was knowing and voluntary when taken, and, as we held in Green, a change in the law subsequent to the plea, including the Court's holding in Booker, does not subsequently render the plea unintelligent or involuntary. Green, 405 F.3d at 1190; accord United States v. Leach, ___F.3d __, 2005 WL 1820046, at *3-4 (10th Cir. Aug. 3, 2005); United States v. Porter, 405 F.3d 1136, 1145 (10th

Cir. 2005).

Finally, enforcing Mr. Alford's appeal waiver will not result in a miscarriage of justice as none of the circumstances identified in Hahn are present in this case. 359 F.3d at 1327. There is nothing in the record to indicate that an impermissible factor was considered by the court in accepting Mr. Alford's plea and accompanying waiver, or that Mr. Alford was inadequately represented during the plea negotiation process. Likewise, Mr. Alford's resultingsentence was within the statutory maximum,[1] and the waiver was not otherwise unlawful. As such, we conclude that the plea agreement and accompanying appeal waiver are enforceable against Mr. Alford's Booker arguments.

[1] For purposes of determining whether a waiver of appellate rights will result in a miscarriage of justice, "statutory maximum" is given its ordinary meaning. Green, 405 F.3d at 1191-92. The statute Mr. Alford was convicted under permits a sentence of up to 20 years. 21 U.S.C. § 841(c)(2). Thus, the 210 month sentence clearly falls within the statutory maximum.

Mr. Alford contends the waiver is unenforceable and that he should be resentenced because (1) he opted out of his waiver of his right to appeal based upon the unforeseen decision in Blakely, (2) Booker is to be applied to cases on direct review, and he preserved Booker error concerning the firearm enhancement, (3) the district court acknowledged that he had a right to appeal with its advice that he had ten days to appeal the sentence, (4) the government failed to object when he stated his intention to appeal, (5) the government failed to timely challenge his appeal by filing a motion to enforce the waiver pursuant to Hahn, and (6) the waiver was not knowing and voluntary. We have rejected the last argument as discussed above and turn to the

remaining arguments.

It is true that counsel advised the court at sentencing that, despite the waiver of appeal in the plea agreement, Mr. Alford viewed Blakely as beyond his contemplation and that he should be able to take an appeal. Aplt. App. at 128. This unilateral statement before the district court does not override the plea agreement; moreover, it is important to note that this statement was not accompanied by a motion to withdraw from the plea agreement. Likewise, the fact that Mr. Alford preserved Booker error before the district court does not overcome the waiver. The district court's advice on the time limit for any appeal was prudent, Fed. R. Crim. P. 32(j)(1)(B); the district court does not decide the effect of any waiver on appellate rights–this court does. Insofar as the government forfeiting its right to stand on the waiver of appeal rights, we recently held that the government does not lose the ability to enforce an appeal waiver by failing to file a dispositive motion and instead waiting to address waiver in its opening brief to this court. Clayton, 2005 WL 1799819, at *2. We see no reason to treat the government's failure to object to a defendant's stated intent to appeal any differently.

B. Substantial Assistance Motion.

Next, we address on the merits Mr. Alford's contention that in light of the plea agreement the government acted in bad faith in refusing to make a motion for a downward departure for substantial assistance under U.S.S.G. § 5K1.1. We review de novo whether the government has breached the terms of a plea agreement. United States v. Hawley, 93 F.3d 682, 690 (10th Cir. 1996) (citation omitted). Additionally, as was established by the Supreme Court in Wade v. United States, 504 U.S. 181, 185-86 (1992), we can review whether the government's refusal to move for a downward departure was unconstitutionally motivated.

However, unless the plea agreement provides otherwise, "absent an unconstitutional motive . . ., the prosecutor enjoys complete discretion in determining whether to file a substantial assistance motion, and . . . a claim seeking to compel a motion based on a defendant's view of what he or she deems to have been 'substantial assistance' will not be entertained." United States v. Massey, 997 F.2d 823, 824 (10th Cir. 1993) (citing Wade, 504 U.S. at 185-87).

Here, the plea agreement provides that "[t]he United States may, but shall not be required to, make a motion requesting the Court to depart from the sentencing range called for by the guidelines in the event defendant provides 'substantial assistance.' This decision shall be in the sole discretion of the United States Attorney." Aplt. App. at 17. From this language it is clear that the government did not breach the plea agreement by refusing to move for a departure under § 5K1.1, as it was never required to make such a motion. Mr. Alford has not alleged that the government's refusal was based on an unconstitutional motive; rather, he simply argues the government was wrong in its assessment that he had not provided substantial assistance. Thus, we lack jurisdiction to review the government's decision. Hawley, 93 F.3d at 691.

The judgment is AFFIRMED; that part of the appeal seeking to challenge the sentence on Booker grounds is DISMISSED given our enforcement of the waiver of appeal in the plea agreement.

Entered for the Court

Paul J. Kelly, Jr.

Circuit Judge